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No. 83-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C. M. UBERMAN ENTERPRISES, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where three commonly owned wax museums suspended payments of quarterly fees due under the terms of franchise contracts lawful on their face solely on the basis of the museums' claim that the contracts had been imposed on them ten to seventeen years earlier by means of illegal tying arrangements, did the lower courts properly conclude that an antitrust defense was not available to the museums against the franchisor's suit to recover the suspended payments?

2. Where a wax museum suspended rental payments due under the terms of a lease of wax museum display figures solely on the basis of the museum's claim that the lease had been imposed on it fifteen years earlier by means of the lessor's alleged exercise of monopoly power, did the lower courts properly conclude that an antitrust defense was not available to the museum against the lessor's suit to recover the suspended rental payments?

3. Where three commonly owned wax museums filed lawsuits in 1977 claiming that franchise contracts entered into from ten to seventeen years earlier had been imposed by means of alleged tying arrangements, and where none of the allegedly tied franchise services had been sold to the wax museums within four years of the lawsuits, did the lower courts properly conclude that the lawsuits were barred by the statute of limitations?*

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* The parties to these actions and their affiliations are set forth accurately in the Petition at (i) n.*.

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BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the citations set forth in the Petition, the opinion of the court of appeals is officially reported at 728 F.2d 503.

COUNTERSTATEMENT OF THE CASE

This Petition arises out of a dispute between several small companies involved in the wax museum business over three franchise agreements and a lease entered into between 1960 and 1967. Petitioners are commonly-owned operators of wax museums in Gettysburg, Pennsylvania;

Gatlinburg, Tennessee; and Williamsburg, Virginia. These museums were established in 1960, 1962, and 1967, respectively, under franchise agreements with respondent National Historical Museum, Inc. ("NHM"). Each franchise agreement provided that NHM would furnish, at the request of the franchisee, services "in connection with the establishment of a museum by franchisee," including historical research for the figures and initial display scenes, advice on the initial cast of characters and story line, assistance in planning floor layouts and advice on promotional techniques and operating procedures. App. A at 6, 14a-15a. In return for these start-up services, the franchisee agreed to pay a fee of five percent of its gross annual receipts for twenty years after the opening of the museum. App. A at 5a-6a.[1]

After providing the start-up services called for by the agreement, NHM or associated individuals occasionally performed minor services at the franchisees' requests for which separate fees were charged. But the franchisees were under no obligation to accept such additional services, and no services were provided by NHM or any of the other respondents under the basic franchise fee after the museums were in operation. App. A at 15a-16a & n.6.

The display figures in the petitioners' wax museums were manufactured by respondent Lynch Display Corporation ("Lynch"). The Gettysburg and Williamsburg museums purchased the figures from Lynch, while the Gatlinburg museum leased most of its figures from Lynch for the same term as the franchise. The Gatlinburg lease agreement provided for a minimum annual

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[1] In Gatlinburg, NHM also agreed not to franchise another wax museum within a 200-mile radius of the franchisee's museum during the term of the franchise. In Williamsburg, the franchisee agreed to pay two and one half percent of annual gross income after the first twenty years for as long as it continued to operate as a wax museum, in return for which NHM bound itself not to establish another franchise within a 100-mile radius. App. A at 6a.

rental plus a percentage of annual gross admissions income above $100,000.[2]

In 1977—seventeen years after the first and a decade after the last of the franchise agreements had been executed—each of the petitioners filed an antitrust suit claiming that its franchise agreement had been illegally tied to the initial sale or lease of Lynch display figures. In addition, the Gatlinburg petitioners claimed that in 1962 the respondents had unlawfully exercised Lynch's alleged monopoly power in the wax museum display figure market to require Gatlinburg to lease rather than buy most of the Lynch figures. Upon filing suit, each petitioner stopped paying franchise or rental fees, which previously had been paid regularly and without protest, solely on the ground that the franchise and lease contracts had been imposed by means of antitrust violations. Respondents counterclaimed under their contracts for recovery of the fees withheld.

In 1981, the district court granted summary judgment for respondents as to petitioners' liability on the contract counterclaims and the following year entered final judgment requiring petitioners to pay all past due franchise and rental fees with interest and all future fees as they came due. App. B at 38a-50a.[3] The court applied the principles set forth in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) (hereafter "*Kelly*") and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982) (hereafter "*Mullins*"), and held that since respondents sought only to recover money

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[2] Contrary to petitioners' statement that the display figures were "paid in full," Petition at 2, the Gatlinburg museum suspended its rental payments in 1977, five years before the end of the lease term.

[3] In its 1981 decision the court also determined that then disputed issues of fact precluded summary judgment for respondents on the underlying antitrust allegations but noted that "even if all of plaintiffs' factual allegations are true, the purported illegality of the disputed agreements is by no means clear." App. B at 32a-38a and 39a n.14.

owed for goods or services previously provided to petitioners, the facts of these cases did not bring them within the narrow class of cases in which *Kelly* and *Mullins* permit the assertion of an antitrust defense to a contract claim. App. B at 39a, 47a-48a.

The district court subsequently dismissed petitioners' tying claims on statute of limitations grounds, based on its conclusion that the undisputed facts showed petitioners "suffered only pecuniary injury, not anticompetitive injury, within the limitations period" established by Section 4B of the Clayton Act, 15 U.S.C. § 15b. App. B at 53a, 57a. The court employed the same reasoning to dismiss as time-barred petitioners' monopolization claim concerning the Gatlinburg lease.

Petitioners appealed from these and other adverse rulings. On February 10, 1984, a unanimous appellate panel essentially affirmed the district court's decisions. App. A at 2a-28a. Based on its own careful review of the record, the court of appeals concluded that no allegedly tied product or service had been sold to the petitioners during the four years before the suits were filed, and that accordingly no "antitrust harm," *i.e.*, no injury to competition, had occurred within the limitations period to revive petitioners' otherwise stale claims. App. A at 14a-17a.[4]

The court of appeals also agreed that under *Mullins* and *Kelly*, an antitrust defense to respondents' contract claims was not available to petitioners on the particular facts of these cases. App. A at 20a-25a. The court explained that the franchise fees sought by respondents

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[4] The court reversed the dismissal of petitioners' challenge to the Gatlinburg lease. Although it expressed "extreme skepticism about the substantive validity of this monopoly lease claim based on maintenance of a single lease by an alleged monopolist," App. A at 18a, the court determined that the statute of limitations was not the proper basis for dismissing such a claim. App. A at 19a.

were not a means of enforcing the allegedly illegal tie between the display figures and museum start-up services but rather constituted "consideration for goods and services, to be paid for on an installment basis, *i.e.*, a routine exchange which *Mullins* was careful to distinguish from the penalty-like agreement it refused to enforce." App. A at 23a. Similarly, the court held, petitioners' contention that the otherwise lawful Gatlinburg lease was imposed as part of an alleged scheme to monopolize the wax museum display figure market is "precisely [the] type of antitrust defense that *Kosuga* clearly held, and *Mullins* affirmed, to be inappropriate in a simple suit for the purchase price of delivered goods." App. A at 25a.

On April 12, 1984, the appellate panel rejected petitioners' request for a rehearing, and the full court of appeals declined without dissent to rehear the case en banc. App. C at 62a-65a.

ARGUMENT

These lawsuits, now in their eighth year before the courts, involve simple contracts entered into long ago for the sale or lease of wax museum start-up services and display figures. There is nothing unlawful about the contracts themselves. They do not, for example, impose price restraints or territorial restrictions on the franchisee museums. Rather the antitrust illegality claimed by petitioners is entirely external to the contracts: an alleged conspiracy to impose the franchise agreements and the start-up services offered under those agreements by means of a tying arrangement and an alleged exercise of monopoly power to force the Gatlinburg museum to lease rather than buy most of its display figures. On these facts, the court of appeals had no difficulty in applying established antitrust principles to conclude that petitioners could not avoid payments due under such lawful contracts by asserting that the contracts were imposed in violation of the antitrust laws and that peti-

tioners' attempt to challenge the alleged tying arrangement by which the franchise agreements purportedly were imposed was untimely.

Neither of these conclusions warrants plenary review by this Court. The court of appeals was careful to limit its holding to the peculiar facts presented by these cases, *see* App. A at 24a & n.10, and hence the precedential value of the decision below is minimal. More important, the court of appeals' decision is fully consistent with relevant decisions of this Court and other courts of appeals. Petitioners' argument that the rejection of their antitrust defense conflicts with *Mullins* ignores the distinction made in *Mullins* between agreements that violate the antitrust laws, which are subject to an antitrust defense, and agreements that merely are the result of or collateral to alleged antitrust violations, which are not subject to such a defense. Similarly, petitioners' contention that the court of appeals erred in dismissing their tying claims fails to recognize the difference between a violation of the antitrust laws and the damages resulting from such a violation. Every circuit that has considered the question has held that only the former gives rise to a new or continuing cause of action sufficient to overcome the four-year statute of limitations.

I. The Court of Appeals Properly Applied *Mullins* and *Kelly* in Rejecting Petitioners' Antitrust Defense to Respondents' Contract Claims

The rule concerning the availability of an antitrust defense to a contract claim was stated in *Kelly* as follows:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.
>
> . . . .
>
> . . . Past the point where the judgment of the Court would itself be enforcing the precise conduct

> made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."

358 U.S. at 518, 520-21 (footnote omitted).

The Court applied that rule in the case before it to strike an antitrust defense to a contract claim for the price of onions sold and delivered. The asserted defense was that the sales contract was part of a larger understanding or conspiracy between the plaintiff and the defendant to keep excess supply off the market and thereby artificially raise the price of onions; the defendant claimed that he had been coerced into purchasing the onions upon the representations of the seller that otherwise the onions would be delivered to the futures market for the purpose of depressing the price of onions, to the defendant's detriment. 358 U.S. at 517.

After discussing the "narrow scope in which the [antitrust] defense is allowed," *id.* at 520, the Court held that the alleged illegal market manipulation scheme was separate from or collateral to the defendant's promise to purchase onions. The latter promise was "an intelligible economic transaction in itself" and therefore was enforceable according to its terms. *Id.* at 521.

Mullins did not purport to alter the rule stated in *Kelly* in any respect. The Court simply found that the contract sued upon in *Mullins* fell within the very narrow category of cases recognized in *Kelly* where a court's failure to entertain an asserted federal antitrust defense would be an error because it could effectively make the court a party to an antitrust violation. 455 U.S. at 79-82.

Unlike the contract in *Kelly*, and unlike those in the present cases, the contract in *Mullins* was not a simple contract for the purchase or rental of goods or services.

It was a collective bargaining agreement between the United Mine Workers and a large number of independent coal producers. One provision of the agreement required the coal producers to make monetary contributions to the UMW's health and retirement funds based on volume of coal actually produced; a second provision, the so-called "purchased-coal clause," required producers to make similar payments with respect to purchases of coal from other producers who were not parties to the collective bargaining agreement. 455 U.S. at 74-75. In defense to an action by the UMW to collect payments due under the purchased-coal clause, Kaiser Steel claimed that the clause effectively constituted a group boycott in violation of the Sherman Act because it imposed a financial penalty on the purchase of nonunion coal. Thus, Kaiser Steel argued, enforcement of the purchased-coal clause would constitute enforcement of the very conduct claimed to be illegal under the antitrust laws. *Id.* at 78.

The Court was receptive to that analysis and held as follows:

> If Kaiser's undertaking is illegal under the antitrust . . . laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. *It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.*
>
> . . . .
>
> *Kosuga* thus contemplated that the defense of illegality would be entertained in a case such as this. If the purchased-coal agreement is illegal, it is precisely because the promised contributions are linked to purchased coal and are a penalty for dealing with producers not under contract with the UMW."

455 U.S. at 79, 82 (emphasis added).

Thus, the basic difference between *Kelly* and *Mullins* is that in *Kelly*, as in the cases here, the contractual obligation to make monetary payments sued upon was an "intelligible economic transaction in itself"—a simple agreement to pay for the purchase of goods or services—and the allegation that this obligation had been imposed by means of an external antitrust violation could not prevent its enforcement. In contrast, the obligation to make payments sued upon in *Mullins* was the central feature of the alleged antitrust violation, the cutting edge of a group boycott that potentially inflicted injury on third parties.

The court below recognized this critical distinction between the promise sued upon in *Mullins*, which in itself violated the antitrust laws, and the promise sued upon by respondents in these cases, which at most was the result of an antitrust violation.[5] The cases relied upon by petitioners are to the same effect.[6]

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[5] "In *Mullins*, the promise to contribute to the health and retirement funds in proportion to defendant's purchases of non-union coal . . . *on its face* embraced the very restraint of trade that the defendant alleged violated the Sherman Act. . . . Unlike the 'illegal promise' in *Mullins*, the promises to pay franchise fees in this case . . . appear rather to be a consideration for goods and services, to be paid for on an installment basis. . . ." App. A at 22a-23a (emphasis in original). The distinction is particularly clear in the case of the Gatlinburg lease. As the court of appeals pointed out, to hold that petitioners' obligation to pay rent under the lease gives rise to an antitrust defense "would lead to the absurd result that all leases violate the antitrust laws." App. A at 24a. Petitioners' challenge to the lease thus depends on their allegation that they were coerced into leasing the figures as part of a larger conspiracy to monopolize the wax museum display figures market, just as the defendant in *Kelly* alleged that he was coerced into purchasing onions from the plaintiff as part of a larger conspiracy to fix prices in the onion market. But, as this Court held in *Kelly* and confirmed in *Mullins*, such an external or collateral antitrust violation cannot be raised as a defense to the contract claim. App. A at 24a-25a.

[6] In the antitrust cases cited in the Petition at 13-14 n.13, the courts refused to enforce contracts that in and of themselves constituted antitrust violations. *Sola Elec. Co.* v. *Jefferson Elec. Co.*,

Petitioners claim, however, that the franchise and lease contracts are illegal—and therefore subject to an antitrust defense—because they require the payment of an "excessive" price for the goods and services received. Petition at 5. But were that view accepted, the rule that an antitrust defense will be permitted only when enforcement of a contract might lend the aid of the court to enforcement of the antitrust violation itself would be swallowed by the exception. Any purchaser of a product or service who later decided that he had made an improvident bargain (or who for whatever reason preferred not to pay) could resist the seller's action for the price by asserting that the contract of sale had been imposed by means of some illegal exercise of market power by the seller and that the agreed-upon price reflected, to some degree, the seller's alleged market power. As the district court pointed out, to extend *Mullins* in that fashion "would be potentially to embroil the antitrust laws in every suit to collect payment for goods and services." App. B at 48a. Nothing in this Court's decisions suggests such an expansive application of the antitrust defense to contract claims.[7]

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317 U.S. 173 (1942) (price-fixing provision in patent license agreement); *McMullen* v. *Hoffman*, 174 U.S. 639 (1899) (agreement to eliminate competition in bidding for public works contract); *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) (market allocation agreement); *Kogod* v. *Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950) (contract to eliminate competition between theatre operators); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955) (market allocation agreement).

[7] For the same reason, petitioners' assertion that the court of appeals improperly substituted its own policy considerations for the antitrust laws (Petition at 13-14) is off the mark. The portion of the court of appeals' decision cited by petitioners simply reflects the policy considerations that underlie the existing rule established by *Kelly* and *Mullins*: that an antitrust defense is not and should not be permitted where the alleged antitrust violation does not appear with reasonable clarity from the very contract—indeed the particular contractual provision—upon which suit is brought.

Petitioners are not the first ones to urge such an unduly broad reading of the *Kelly-Mullins* rule. In *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983), the Fifth Circuit rejected an antitrust defense to a contract claim in circumstances virtually identical to those presented here. In an argument that echoes petitioners' assertions, the defendant in *Avondale* claimed that it was entitled to raise an antitrust defense to a suit for payments due under a contract because the contract embodied an illegal tying arrangement and therefore was "intrinsically illegal." 677 F.2d at 1058. After tracing this Court's development of the antitrust illegality defense and concluding that "[t]he restrictive *Kelly* approach was reinforced in [*Mullins*]," the court of appeals held that since the plaintiff was not suing to enforce the alleged tie-in by requiring defendant to accept the allegedly tied product, an antitrust defense was not available against the plaintiff's claim for payments due under the contract. *Id.* at 1059-60.

The defendant in *Avondale* sought relief in this Court, arguing as do petitioners that *Mullins* permits the assertion of an antitrust defense in an action to compel payments for an allegedly tied product. 51 U.S.L.W. 3485-86 (U.S. Jan. 4, 1983). Indeed, the defendant contended that the Fifth Circuit's decision so clearly conflicted with *Mullins* that summary reversal was appropriate. *Id.* at 3486. This Court denied the petition. 103 S.Ct. 729. The same result is warranted here.

II. The Court of Appeals' Dismissal of Petitioners' Tying Claims Is Consistent With Applicable Decisions of This Court and Other Circuits

Petitioners' challenge to the dismissal of their tying claims on statute of limitations grounds is premised on a conflict among the circuits that does not exist. All three courts of appeals that have considered the question have

held that the mere collection of payments within the limitations period under a prelimitations contract allegedly imposed by means of an illegal tie-in is not sufficient to overcome the statutory bar set forth in 15 U.S.C. § 15b. App. A at 17a; *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d at 1055-56 (plaintiff's demand for payment under alleged tie-in contract may have resulted in pecuniary injury to defendant but did not constitute injury to competition giving rise to an antitrust cause of action within the limitations period); *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982) (receipt of profits under prelimitations contract allegedly imposed by means of tying arrangement "is not enough to restart the statute of limitations").[8]

These decisions are fully consistent with, and indeed mandated by, the requirements of Sections 4 and 4B of the Clayton Act, 15 U.S.C. §§ 15 and 15b, and decisions of this Court concerning the time in which an antitrust action must be brought. Clayton Act § 4b requires that an antitrust suit be filed within four years after the cause of action accrued. App. D at 68a. Clayton Act § 4 provides that an antitrust cause of action accrues when (1) a person suffers injury to business or property caused by (2) conduct in violation of the antitrust laws. App. D at 66a. This Court has made clear that while

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[8] *See also, Electroglas, Inc.* v. *Dynatex Corp.*, 497 F.Supp. 97, 104-106 (N.D. Cal. 1980) (defendant's collection of installment payments for allegedly tied product sold to plaintiff more than four years before suit did not constitute an antitrust violation within the limitations period); *Bass* v. *Boston Five Cent Savings Bank*, 478 F.Supp. 741, 747 (D. Mass. 1979) (claim challenging prelimitations mortgage agreements as illegal tying arrangements held time-barred notwithstanding defendant's collection of mortgage payments within limitations period); *Landon* v. *Twentieth Century-Fox Film Corp.*, 384 F.Supp. 450, 458 (S.D.N.Y. 1974) (claim challenging prelimitations copyright license agreement as illegal tying arrangement held time-barred notwithstanding defendant's receipt of license payments within four years of the lawsuit).

both of these elements are necessary to maintain an antitrust suit, it is the second element—the antitrust violation—that determines the commencement of the limitations period. Consequently, an action challenging illegal conduct occurring more than four years before suit is filed will be barred unless the plaintiff demonstrates not only an injury within the limitations period but also that the injury resulted from the persistence or reoccurrence of the illegal conduct within four years of suit. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (holding that "each time a plaintiff is *injured* by *an act* of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, *the statute of limitations runs from the commission of the act*") (emphasis added); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968) (holding that conduct beginning more than four years before suit could be challenged where it constituted "a continuing violation of the Sherman Act *and* . . . inflicted continuing and accumulating harm") (emphasis added).[9]

It necessarily follows from these decisions that "the harm that creates the new cause of action [within the limitations period] must be '*antitrust* harm, *i.e.*, a continuing injury to *competition*, not merely a continuing pecuniary injury to a plaintiff.' *Electroglas, Inc.* v. *Dynatex Corporation*, 497 F.Supp. 97, 105 (N.D. Cal. 1980) (emphasis in original)." *Kaiser Aluminum & Chemical*

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[9] *Zenith Radio* created an exception in cases where the conduct that violates the antitrust laws results in future damages the accrual of which is speculative or the amount and nature unprovable until some time within four years of the commencement of suit. 401 U.S. at 339-40. In such cases the suit will be considered timely even though only injury to the plaintiff, not an antitrust violation, occurs within the four-year limitations period. In the present cases, the district court held that this exception was not applicable, App. B at 59a-60a, and petitioners did not challenge that holding in the court of appeals or in this Court.

Sales, Inc. v. *Avondale Shipyards, Inc.*, 677 F.2d at 1055. In the case of tying arrangements, the antitrust harm occurs when the tied product is forced on the purchaser, thereby foreclosing competition in the market for the tied product. *Jefferson Parish Hospital District No. 2* v. *Hyde*, 104 S.Ct. 1551, 1558-59 (1984). While the pecuniary injury to the purchaser may persist by reason of its payments for the tied product within the limitations period, that injury alone does not give rise to a cause of action independent of the original tying violation. *Avondale*, 677 F.2d at 1055-56; *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d at 693-94.

The decisions of the Third and Seventh Circuits cited by petitioners (Petition at 17), although they did not involve tying arrangements, are in accord with the District of Columbia, Fifth and Ninth Circuits that the critical element in determining the timeliness of an antitrust suit is the conduct of the defendant that allegedly violates the antitrust laws, not the injury to plaintiff resulting from that conduct. Thus, in *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3rd Cir. 1978), the court held that the plaintiff's suit to challenge an exclusivity provision in a prelimitations lease agreement between the plaintiff's competitor and a shopping center was timely in view of the competitor's invocation of the exclusivity provision within four years of suit to prevent the extension of the plaintiff's lease.[10] Similarly, in *Baker* v. *F & F Investment*, 420 F.2d 1191, 1200 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), a case involving an alleged price fixing conspiracy, the Seventh Circuit held that in determining the date on which the limitations period begins to run, "the touchstone of our

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[10] The court also held that the plaintiff's claim came within the "speculative damages" exception established by *Zenith Radio*. 587 F.2d at 138-39.

inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury."

The only case arguably contrary to this consistent line of authorities is *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977), in which the court held that the defendants' collection of quarterly rent and increases in the rent charged under recreational facility leases allegedly tied to the sale of condominiums to the plaintiffs constituted separate antitrust violations within the limitations period that injured the plaintiffs and upon which they could bring suit. As petitioners acknowledge, however, the Fifth Circuit essentially has limited *Mangurian* to its facts by holding that the rationale of *Mangurian* applies only in cases involving speculative or unprovable damages. *Avondale*, 677 F.2d at 1052-53; *City of El Paso* v. *Darbyshire Steel Co.*, 575 F.2d 521, 523 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979). This limitation is not surprising, for as one court pointed out in rejecting *Mangurian*, "[f]ollowed literally, [the *Mangurian*] theory would render the Clayton Act statute of limitations virtually inoperative in all cases involving relatively long-term contracts." *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. at 105. *See also, Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d at 694.[11]

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[11] In any event, *Mangurian* is distinguishable from the present cases as well as the other cases discussed above. In addition to the fact that the right of the defendants in *Mangurian* unilaterally to increase the amount of rent rendered future damages speculative at the time the lease agreements were executed, the alleged tying arrangement in *Mangurian* involved not only continuing payments but continuing purchases of the tied product. As long as the plaintiffs were required to lease recreational facilities from the defendants, competition in the provision of such facilities was foreclosed. In the present cases, by contrast, competition in the provision of wax museum start-up services was foreclosed, if at all, only when the franchise agreements were entered into and the museums were established.

Faced with the absence of any true conflict among the lower courts on this issue, petitioners attempt to create one by comparing the decision below to a line of authorities holding that the damages resulting from an illegal tying arrangement are the amount by which the price charged for the tied product or service exceeds its fair market value. Petition at 19-20. But those authorities are as irrelevant as they are irrefutable. The measure of damages in tying cases never was in issue in the rulings below, and the court of appeals recognized that the damages resulting from the alleged tie-in would be "the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice." App. A at 23a. The important point is that those damages are the result of the alleged antitrust violation, not the violation itself. As the decisions discussed above make clear, it is the violation that is the determinative factor for statute of limitations purposes.

Thus, there is no inconsistency between the cases relied upon by petitioners, which simply define the measure of damages resulting from a tying violation, and the statute of limitations cases, which hold that a cause of action accrues at the time a tying violation occurs, not when the damages from such a violation are suffered. With the possible exception of the discredited *Mangurian* decision, petitioners' equation of the elements of violation and damage is not supported by any authority. The Court need not grant certiorari to consider an issue on which the circuits are unanimous and fully in accord with the decisions of this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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